No. 453.

Brf. of Warburton for Plaintiff

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Supreme Court of the United States.

OCTOBER TERM, 1899.

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MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PETITIONER,

vs.

GEORGE E. HILL, HELEN K. HILL, AND E. C. HILL ET AL., DEFENDANTS IN ERROR.

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The petitioner has asked leave to file like petitions for writs of certiorari in two other cases, Mutual Life Insurance Company *vs.* Sears and Mutual Life Insurance Company *vs.* Cohen, which were argued in the circuit court of appeals at the same time and in connection with the above case. They were decided at the same time, the court writing the principal opinion in the above case, and referred to it as the decision governing the law of the other two above-mentioned cases. (See Record, Insurance Co. *vs.* Sears, p. 45; Insurance Co. *vs.* Cohen, Record, p. 51.) So we shall, in a large measure, brief these three cases together under the above title and file in each of the two other cases short briefs, calling the court's attention to the points of difference in each.

We do not think that the petitioner has brought itself

within any of the requirements of the rule laid down by this court as to when it will grant a writ of certiorari. In the case of Lau Ow Bew *vs.* The United States, 144 U. S., 47, on page 58, this court says writs of certiorari—

"will only be issued when questions of gravity and importance are involved, or in the interest of uniformity of decision. The object of the act is thereby obtained."

Again, in the case of Amer. Cons. Co. *vs.* R. R. Co., 148 U. S., 372, on page 383, this court, speaking of its authority to grant writs of certiorari, says it—

"has been held to be a branch of its jurisdiction which should be used sparingly and with great caution, and only in cases of peculiar gravity and general importance or in order to secure a uniformity of decision."

The petitioner has not pretended to show that it raised any question in the court below of any peculiar or particular gravity. If so, what one? We venture the assertion that no question can be found of any more gravity, as the word is used by this court, than there may be found in almost any case that goes to the circuit court of appeals.

It cannot be urged seriously that any constitutional question is raised; none was assigned as error in the circuit court of appeals, and none can be urged here.

Nor can it be urged that this court should pass upon any question raised in order to secure a uniformity of decision.

On every question assigned as error there is a uniformity of decision. Every court—and they are numerous—that has passed upon the errors assigned has held against its contention. In fact, if this court should grant this writ and upon the hearing sustain any one of petitioner's assigned errors, then for the first time would there be a conflict of decision. This will clearly appear *infra*.

This action was begun in the circuit court to recover on a policy of insurance issued by the Mutual Life Insurance

Company of New York upon the life of George D. Hill. The company denied liability on the policy, on the ground that the policy became forfeited prior to Mr. Hill's death, on account of non-payment of an annual premium, and that defendant in error was estopped from denying that a forfeiture had taken place. The petitioner claimed that the policy was made in the State of Washington and was a contract to be construed only by the laws of that State.

The defendant in error contended that the policy (1) was a New York contract and governed by its laws; (2) that the law of 1876, amended in 1877, requiring a specified statutory notice to be served as a condition precedent to the right of the company to declare a policy forfeited, was in the nature of an amendment of the charter of insurance companies or a limitation on their powers, so as to make it compulsory upon such companies to serve the statutory notice, no matter where the contract was made.

The lower court held that it was a New York contract; that the statute was a part of defendants in error's contract; that the service of the notice required by the statute could not be waived, and as the petitioner made no claim or pretense that it complied with or attempted to comply with the requirements of the statute, held the company's defense not good, gave defendants in error judgment, and its action was by the court of appeals affirmed.

Only three questions of any importance were involved:

1. Was New York the place of contract?

2. If not the place of contract, was the statute in question a limitation on the power of petitioner, so that it could only forfeit the contract therewith?

3. Whether the statute of New York relative to forfeiture could be waived directly or indirectly?

We will support our contention that it was a New York contract, that it was a limitation on the power of the cor-

poration, that it could not be waived, by every court that has passed upon it or a like question. But of particular and great importance is the fact that the highest of New York has so held, which binds every other court.

All other questions raised, and they are not of importance, such as necessity of tender of unpaid premiums, and the form of pleadings, etc., have also been decided, both by the highest court of New York and the State of Washington, and that we followed those decisions in every particular. In fact, there is no contention that we did not. In addition, all these questions have been decided in our favor by the supreme courts of California, Iowa, Texas, and Michigan; also by 3rd C. C. A. and 9th C. C. A. We will discuss these propositions in the order named.

I.

THE POLICY OF INSURANCE IN CONTROVERSY IS A NEW YORK CONTRACT, AND CONTROLLED BY THE STATUTE OF NEW YORK WITH REFERENCE TO FORFEITURES OF LIFE-INSURANCE POLICIES.

The statute above referred to is found in full in the court's opinion, Record, p. 57.

The application for the policy of insurance was made to the company at its home office in New York. The policy was issued in New York upon receipt of the premium, of which it acknowledges the receipt. The premiums were all payable in New York. By its terms the proofs of death were to be delivered at the home office of the company in the city of New York. The policy when it matured was payable in the city of New York. The policy was to be forfeited, if at all, by the non-payment of a premium at the home office in New York. In other words, New York was the place of performance in every particular. This shows clearly that the parties in-

tended that the laws of New York should govern as to the liabilities of the parties and to be the place of contract. Especially is this true of defendant in error. It prepared the policy; all these provisions were in the printed form of the policy. Again, a clause in the printed form of the policy expressly waived the requirements of the service of the statutory notice. What statute did it refer to, if not this New York statute. It could not refer to one in Washington, because there was none to waive.

The provision relative to waiving service of the statutory notice could only refer to the statute of New York; hence the company clearly considered it a New York contract. It was also stipulated in the application that "*the contract of insurance when made shall be and be construed at all times and places to have been made in the city of New York*" (Record, p. 8).

The policy also provided that after the payment of stipulated premiums and upon the surrender of the policy it would issue a new one "for the amount required by the act of May 21, 1879, chapter 347, Laws of the State of New York." (See Record, p. 6, bottom of page.) Hence its liability to its policy-holders as to the reserve and the portion (two-thirds by the New York law) it would give its policy-holders in case of default was to be measured by the New York law—a very good reason why the company wanted to make no mistake about the contract being a New York contract.

If we stop to consider that this policy was prepared by the company, and we may presume by those skilled in the law relative to such contracts, it is impossible to come to any other conclusion than that it was intended by the insurance company to bring the policy within the protection of the New York laws and have its liability measured by such laws—at least, it used language most appropriate to express such intent—and exclude every other legal con-

struction. It cannot complain if the court so interpret the contract, which it prepared presumably in its own interest.

We do not believe a case can be found anywhere which, under the above facts, would not support our contention that the above facts make the contract in controversy a New York contract. A recent decision of this court in the case of London Assurance *vs.* Companhia de Moagens de Barreiro is to that effect. In that case there was not nearly so much in the contract to show the intent of the parties as to the place of the contract as there is in the one we are now discussing:

"Under the circumstances, we think that this contract of insurance is to be interpreted according to the English law. The appellant is an English company. It made the contract in Philadelphia by its agents, and that contract, by its terms, was to be performed in England. The parties to it understood and agreed that, in case of loss or damage to the interest of the insured under the certificate, the same was to be reported to the corporation in London, and be paid in sterling at its office in the Royal Exchange in the city of London, and the claims were to be adjusted according to the Loyds, but subject to the conditions of the policy and the contract of insurance.

"Generally speaking, the law of the place where the contract is to be performed is the law which governs as to its validity and interpretations."

Mr. Justice Peckham, after reviewing other cases sustaining the doctrine announced, closes the opinion relative to this feature of the case in the following language:

"This is what the parties expressly stipulated for, and it is no injustice to the company to decide its rights according to the principles of the law of the country which it has agreed to be bound by so long as, in a case like this, the foreign law is not in any way contrary to the policy of our own. (See Liverpool & G. W. Steam Co. *vs.* Phœnix Ins. Co., 129 U. S., 397, 446, 453; 9 Sup. Ct., 469)."

London Assurance *vs.* Companhia de Moagens de Barreiro, 167 U. S., 149.

The following are excerpts from decisions of various courts, fully sustaining our claim:

"The rights and benefits given by the laws of Connecticut in this regard are as much a part of these contracts as if incorporated therein, not only because they are to be taken as if entered into there, but because there was the place of performance, and the stipulation of the parties was made with reference to the laws of that place."

Wash. Central Bank *vs.* Hume, 128 U. S., 195.

"The only substantial difference between this case and No. 1507, just decided, is that the clause set out and construed in that case was not in the policy upon which the action was brought. There was, however, in the application upon which it was issued a provision that, 'this application is made to the Mutual Life Insurance Company of New York, subject to the charter of the company and the laws of the State of New York,' and, in our opinion, this was sufficient to locate the contract in that State, and require that rights thereunder should be determined by its laws.

"Hence, for the reasons stated in the opinion in the foregoing case, the judgment rendered in this must be affirmed."

Griesemere *vs.* Ins. Co., 10 Wash., 211.

"The policy was signed by the president and the secretary of the company, in the city of New York. The premium was made payable there and the amount of the policy was to be paid, in the event of the death of the assured, at the city of New York. It was also expressly agreed that the policy should be construed to have been made in the State of New York. It was therefore a New York contract, and is to be governed by the laws of that State."

Goodwin *vs.* Ins. Co. (Iowa), 66 N. W., 157, on p. 160.

The circuit court of appeals for the sixth circuit in a very recent case, in an opinion by Judge Taft, says:

"There can be no doubt that this policy is to be construed according to the law of Pennsylvania. It is expressly provided in the application, which is made part of the policy, that 'the place of contract shall be the city of Philadelphia,

State of Pennsylvania.' In Weyman *vs.* Southard, 10 Wheat., 1–48, Chief Justice Marshall stated it to be a principle of universal law that 'in every forum a contract is governed by the law with a view to which it is made.' (See Pritchard *vs.* Norton, 106 U. S., 124, 136; 1 Sup. Ct., 102, and cases there cited.) In this case no necessity exists for presumption from the circumstances, because the intention of the parties is expressed."

Penn. Mutual Ins. Co. *vs.* Savings Bank, 72 Fed., 413, on p. 418.

In a recent case this question was before the supreme court of Texas. The provisions in the applications for policies in the case were that "this application is made to the Mutual Life Insurance Company of New York subject to the charter of the company and laws of New York." The court says:

"We think the provisions of the New York statute, under the facts as shown in this case, entered into and became a part of the contract between the parties."

Mullen *vs.* Mutual Life Ins. Co., 34 S. W., 605.

The following authorities fully support the above authorities:

Phinney *vs.* Insurance Co., 67 Federal Reporter, 493.

Coglan *vs.* Railroad Co., 142 U. S., 101, at page 109.

Hall *vs.* Cordell, 142 U. S., 116, at page 120.

Washington Bank *vs.* Hume, 128 U. S., 206.

Pritchard *vs.* Norton, 106 U. S., 124, at pages 136–141.

Scudder *vs.* Bank, 91 U. S., 406.

Scotland Co. *vs.* Hill, 132 U. S., 107.

Steamship Co. *vs.* Phœnix Insurance Co., 129 U. S., 397.

Penn. Insurance Co. *vs.* Bank, 19 C. C. A., 285.

Nixon *vs.* Insurance Co., 81 Federal Reporter, C. C. A., 796.

Miller *vs.* Tiffany, 1 Wall., 298, on page 310.

Hyde *vs.* Goodnow, 3 N. Y., 266–269.

Griffith *vs.* Insurance Co., 106 California, 627.

Goodwin *vs.* Insurance Co., 66 Northwestern (Iowa), 157, at page 160.

Massachusetts Insurance Co. *vs.* Hale, 23 Southwestern (Ga.), 849.

Mullen *vs.* Insurance Co., 34 Southwestern (Texas), 605.

Insurance Co. *vs.* Pollard, 26 Southeastern (Va.), 422.

THE CLEMENT CASE, CHIEFLY RELIED UPON BY PLAINTIFF IN ERROR, IS NOT IN CONFLICT WITH THE PROPOSITION THAT A CONTRACT IS TO BE CONSTRUED BY THE LAWS WITH A VIEW TO WHICH IT IS MADE.

The cases cited by plaintiff in error which it claims hold against this contention of defendant in error are not in point. The one chiefly relied upon is the case of Clement *vs.* The Equitable Life Insurance Company, 140 U. S., 226.

In the first place, there is no provision in the contract (either in the policy or application, which together make one contract) stipulating that the contract should be subject to the laws of New York.

In the second place, the Equitable Insurance Company, as a matter of comity, not of right, was permitted by the State of Missouri to come into that State and make contracts with the citizens of Missouri. Having been thus permitted to come into the State to make contracts with its citizens, it was perfectly competent for the State of Missouri to impose such terms upon it and like companies as the State saw fit, or exclude the foreign insurance companies altogether from their territory.

Bank *vs.* Earl, 13 Peters, 519.

Runyan *vs.* Coster, 14 Peters, 122, at page 129.

Hooper *vs.* State of California, 15 Supreme Court Reporter, 207, at page 220.

The legislature prior to the making of the contract had passed an act regulating the forfeiture of life-insurance policies after the paying of two annual premiums, to the effect that the insured should have the benefit of his reserve by the way of extended insurance. This statute established the public policy of the State of Missouri relative to such contracts. By another provision of the law it was made the duty of any foreign insurance company, if it accepted the privilege of doing business in that State, to make all its contracts in compliance therewith. The section last mentioned is in the following words:

"SECTION 5983. No policy of insurance on life, hereafter issued by any life insurance company authorized to do business in this State on or after the first day of August, A. D. 1879, shall, after payment upon it of two full annual premiums, become forfeited or void by reason of the non-payment of premium thereon, but it shall be subject to the following rules and commutations, to wit:"

The policy in the Clement case was issued after the first day of August, 1879, as provided in the above section. It must be presumed the company was authorized to do business within the meaning of that section. If so, then it accepted the terms provided in the statute and was bound to make no contract of forfeiture in disregard of the statute. But this it did attempt to do, even though the contract was actually consummated in Missouri. This court held two things: first, that the contract was a Missouri contract, as it was there consummated; second, and more important than the above, it held that this statute could not be waived by the parties. If the statute could not be expressly waived by the parties because of the provision of the statute above set forth (which is copied in the opinion of the court), then it must follow that it could not be done indirectly by making the place of contract outside of Missouri in order to avoid this statute. It would be a strange rule of law that would hold the parties could not waive a statute of Missouri and yet

hold that it was competent for the parties to make a contract in Missouri and to avoid the statute by making the place of contract elsewhere. It needs no authority to support this distinction. It suggests itself forcibly and distinctly. No other result could be reached logically. But we are not without authority on the proposition. It has been clearly recognized in two decisions of this court.

In the case of Hume *vs.* The Ins. Co., 128 U. S., 195, already cited, the company was a Connecticut company. The contract was actually consummated in the District of Columbia; but the contract further provided that Hartford, Connecticut, should be the place of contract. The Supreme Court of the United States held that the contract was subject to the laws of Connecticut, and those laws should control as between the parties to the contract as well as creditors of the insured, and in so deciding Chief Justice Fuller says:

"And if it is so as between Hume and the Connecticut companies, then he could not at any time dispose of these policies without the consent of the beneficiary. Nor is there anything to the contrary in the statutes or general public policy of the District of Columbia."

Washington Bank *vs.* Hume, 128 U. S., 195, on p. 207.

In other words, if there had been a statute or public policy of the District of Columbia which the company was attempting to evade by making the place of contract Hartford, Connecticut, such provisions of the contract would have been null and void.

In the case of London Assurance Co. *vs.* Companhia de Moagens, etc., *supra*, the same distinction is recognized. In this case the contract was actually made in Philadelphia. The policy covered the vessel *en route* to Portugal. The contract was to be performed in England. This court held for that reason that it was an English contract, and that it would determine the rights of the parties according to the

English law, inasmuch as construing it by the English law would not in any manner conflict with the policy of the State of Pennsylvania, where the contract was actually made. The portion of the opinion below quoted suggests that if the parties were seeking to avoid the public policy of the State of Pennsylvania by making the place of contract England, it would not have enforced it according to the laws of England. The portion of the opinion referred to is as follows:

"This is what the parties expressly stipulated for, and it is no injustice to the company to decide its rights according to the principles of the law of the country which it has agreed to be bound by, so long as, in a case like this, the foreign law is not in any way contrary to our own."

London Assurance Co. *vs.* Companhia de Moagens de Barreiro, 167 U. S., 149.

This same doctrine with reference to this same Missouri statute is very forcibly set forth in a decision rendered by Judge Treat, in which Judge McCrary concurred.

Fletcher *vs.* Insurance Co., 13 Federal Reporter, 562, at page 568.

In a subsequent case the above opinion was cited with approval by Mr. Justice Brewer, sitting as district judge.

Ball *vs.* Insurance Company, 32 Federal, 273.

In a subsequent case Judge Caldwell, sitting in the same circuit, concurred with Judges Treat, McCrary, and Brewer in the opinions above referred to.

Berry *vs.* Insurance Company, 46 Federal, 439.

The ninth circuit court of appeals in the case of Ins. Co. *vs.* Nixon thus distinguished the Clement case from one similar to this, where the insurance company were maintaining the same position that petitioner is here, using this language:

"Not only so, but, as has been seen, all of the conditions of the policy were to be performed in that State (New York). Proof of loss, if any, was to be made there, and the payment agreed to be made by the defendant corporation in the event of the death of the assured was to be made in the State of New York. It would seem to be very clear, therefore, that the rights and obligations of the respective parties are to be measured and controlled by the laws of that State, subject, perhaps, to any additional limitations or conditions imposed by the statutes of the State (then Territory) into which the defendant corporation went to solicit the business in question; for it may be true that every foreign corporation that enters a State other than that of its creation, and there transacts business, does so in subordination to the statutes of the State permitting its entry therein, and that no business transacted by virtue of the privilege thus conferred can, by any sort of contract, be removed from the operation of the statutes of the State permitting the business to be transacted. But in the present case, as has been said, there is no Washington statute affecting that portion of the policy here in question."

Ins. Co. *vs.* Nixon, 81 Fed., 798.

THE STATUTE OF NEW YORK IS A LIMITATION ON THE POWER OF THE CORPORATION AS TO THE FORFEITURE OF INSURANCE CONTRACTS AND IN EFFECT AN AMENDMENT OF ITS CHARTER, AND CONTROLS THE CORPORATION AS TO THE MANNER OF FORFEITING POLICIES OF INSURANCE, NO MATTER WHETHER THE CONTRACT IS MADE INSIDE OR OUTSIDE OF THE STATE OF NEW YORK.

There can be no question but that the State of New York could so limit the power of insurance companies by it incorporated, if it saw fit to do so. It is by its authority alone that the corporation exists. It has such powers, and only those, as the State sees fit to grant to it. The State can prescribe the condition upon which such corporations may forfeit such contracts. Did the legislature of New York, by this act, so limit this and like corporations chartered by it?

If it was a new question or if the highest court of New York had not so construed the law, it might be a debatable one; but that court has twice decided that such is the meaning and scope of the act.

One Carter was a resident and citizen of the State of Georgia. In 1870 the Brooklyn Insurance Company of New York issued a policy of insurance on his life. Where this contract of insurance was consummated is not shown in the opinion or statement of the case, and it is immaterial. The contract was made six years before the enactment of the statute, the law requiring notices. In 1877, 1878, 1879, and 1880 Mr. Carter paid his renewal premiums in Georgia; so, according to the petitioner's contention, the contract of renewal was made in Georgia. It would not be a renewal within the meaning of the following opinion until it was paid in Georgia. The appellate court of New York was compelled to pass upon the question whether or not the payment of a renewal premium was a renewal of the contract within the meaning of the statute. It held that it was. The opinion on this point is as follows:

"Upon this state of facts several questions arose upon the trial, among which the material ones are:

"First. Whether the law of 1876 requiring notices to be sent to the policy-holders applies to this policy?"

"It is contended by the appellant that the act applies only to policies 'issued or renewed' after its passage, and that a policy cannot be said to have been renewed unless it has become forfeited or lapsed, and has been afterward restored or renewed by the insurance company." * * *

"We are also of the opinion that the payment, and receipt by the company, of each annual premium constitute a renewal of the policy within the meaning of the term 'renewal' as used in the act."

(The renewal was made by the assured in Georgia.)

"While it was provided by the policy that it should continue for the term of the natural life of the assured, it was expressly provided that this was upon the condition that he

should pay the annual premiums as they became due by the terms of the policy. A failure to pay such premiums in any year was declared to render the policy null, void, and of no effect, but when paid it continued, by force of such payment, the policy in existence for the period of another year. This process each year revived or renewed the policy as it approached the period of its agreed termination." * * *

"We are, therefore, of the opinion that the plaintiff's policy was renewed within the meaning of the act. We are also of the opinion that no such notice was given to him as the statute required. The law reads that the notice should be sent to the assured at his known place of address, and there is no claim but that the defendant knew his place of address at all times subsequent to the year 1880."

Carter *vs.* Life Ins. Co., 110 N. Y., 15, on page 20.

In a subsequent case the appellate court of New York was called upon to pass upon the question whether or not it was necessary for the Brooklyn Life Insurance Company of New York to send a notice to the policy-holder residing in the State of Pennsylvania.

One Matteson, on the 24th day of May, 1884, took out a policy in the above company. He paid but one quarterly premium and the company failed to serve upon him a notice for the second quarterly premium, and he thereafter died without having paid this premium. It appears by the record which we have had certified by the clerk of the court of appeals of New York, and which we will file with these briefs, that Mr. Matteson for at least ten years prior to the issuance of the policy had resided in Pennsylvania. The company contended that it was not necessary for it to allege or prove the service of the statutory notice, Matteson being a non-resident of New York, and the question is squarely raised as to whether or not it was necessary to send the notice to Mr. Matteson, a resident of Pennsylvania, as the condition precedent to the right of the company to declare

the policy forfeited. The court disposed of the matter in the following brief paragraph:

"The policy itself contained the stipulation that it was a contract made and to be executed in the State of New York, and construed only according to the laws of that State. Aside from the provisions of the policy and under the general rules of law the contract was subject to the terms and conditions expressed in chapter 341 of the Laws of 1876, as amended by chapter 321, the Laws of 1877. This statute was a part of the contract in question, and governed the rights and obligations of the parties in precisely the same way and to the same extent as if all its terms and conditions had been actually incorporated into the policy."

Baxter *vs.* Insurance Company, 119th New York, 450, on p. 454.

The two cases above referred to clearly and distinctly show that the highest court of New York treats it as a limitation on the power of the corporation and makes it incumbent upon it to serve the statutory notice, no matter where the contract is made or the policy-holder resides.

Then can it be seriously urged that this statute did not make it compulsory upon the company to serve a notice upon Mr. Hill during his lifetime? It is immaterial whether the highest court of New York properly construed the law or not. Its construction of the law is binding upon every other court. But we maintain its decision is not only binding upon this and all other courts, but, further, that it is the proper construction of the statute, and the language of the act was susceptible of no other construction.

The language of the act clearly shows it was intended to limit the power of corporations to forfeit a contract insurance except in the manner provided by statute.

We further contend that this statute was, in effect, an amendment of the charter of every life insurance corporation chartered by the legislature of New York, and that even though the appellate court of New York had not passed upon the question and the question was to be here decided

for the first time, this court must hold that this statute was a limitation on the powers of the corporation to forfeit the contract except in the manner pointed out by the statute.

Appellant's contention that the statute was meant only to apply to contracts actually made in New York cannot be maintained. True, the laws of New York could only affect foreign insurance companies when they came within its dominion. It had no further control over them. But this corporation that the State gave being is controlled by it wherever it goes. Will plaintiff in error maintain that this corporation can step beyond New York and make a contract it cannot make in the home State? Does its power to contract along any line increase as it passes the border line of New York? Can it accept a contract from non-residents of the State of New York when it has no power and it would be unlawful for it to accept a like contract from a resident of its home State? All applications must be accepted at the home office in New York and the policies issued therefrom. Can it make any difference from whence the proposition comes—whether from inside or outside of the State? Its powers cannot be one whit greater outside than inside. The foreign State may further limit the power of such corporations as to business done in such State, but it cannot increase it. Does the State of Washington, when, as a matter of comity to other States, she permits the insurance corporations of such States to come within her borders to trade with her citizens, permit them to come in like freebooters, without any restraint from the law or charter of the home State, and especially from such provisions in such law or charter particularly provided for the protection of such parties who deal with such corporations?

This rule was adopted in a case reported in the 138 Pa.:

"It is urged, however, that this act of 1881 applies only to policies upon the lives or property of persons within this Commonwealth, and that as the property insured by the defendant was located in West Virginia, the rule above stated

does not apply. We regard this as a narrow construction of the act. We think that it was intended to produce a uniform rule of procedure, and to apply to all insurance companies incorporated by the laws of this State, and to all other insurance companies insuring lives or property within this State."

Hebb *vs.* Insurance Co., 138 Pa. St., 174, on p. 180.

The same rule is laid down by the supreme court of Maryland, in the decision reported in the 74th Maryland, in this language:

"But the statute of Pennsylvania, which was offered in evidence, enacts that in such cases no misrepresentation or untrue statement in the application, made in good faith by the applicant, shall effect a forfeiture or be a ground of defense, unless it relates to some matter material to the risk. It is beyond question that the powers and capabilities of a Pennsylvania corporation are conferred and regulated by the laws of that State; without its authority it could not exist at all. Every contract it makes, every act it performs, every right it acquires, and every obligation it assumes, must be by virtue of the same authority. It may make contracts, transact business, sue and be sued, beyond the limit of the State of its origin. But all these transactions are by the permission of the State where they occur, and not by virtue of any right belonging to the corporation. Everywhere within and without the State which created it, its contracts are limited, construed and sustained according to its charter and the laws which affect its operation. In McKine *vs.* Glen, 66 Mo, 484, this court said: 'It is a similar principle, that a corporation and all who deal with it are bound by the law of its creation, and all such laws may be legitimately prescribed by its government by the sovereign authority from which it derived its corporate existence.'"

Insurance Co. *vs.* Ficklin *et al.*, 74 Myd., 172, on p. 180.

A like rule is laid down by this court:

"Relfe is not an officer of the Missouri State court, but the person designated by law (the Missouri State law) to

take the property of any dissolved life-insurance corporation of that State and hold and dispose of it in trust for the use and benefit of creditors and other parties interested.

"*The law which clothed him with this trust was in legal effect part of the charter of the corporation.* He was the statutory successor of the corporation for the purpose of winding up its affairs. * * * We are aware that except by virtue of some statutory authority an administrator appointed in one State cannot generally sue in another, and a receiver appointed by a State has no extraterritorial power. But a corporation is the creature of legislation, and may be endowed with such powers as its creator sees fit to give. * * * No State need allow the corporations of other States to do business within its jurisdiction unless it chooses, with perhaps the exception of commercial corporations; but if it does without limitation, express or implied, the corporation comes in as it has been incorporated. Every corporation necessarily carries its charter wherever it goes, for that is the law of its existence. It may be restricted in the use of some of its powers while doing business away from its corporate home, but every person who deals with it everywhere is bound to take notice of the provisions which have been made in its charter for the management and control of its affairs, both in life and after dissolution."

Relfe *vs.* Rundle, 103 U. S., 222, pp. 225–'6.

"A corporation 'must dwell in the place of its creation, and cannot migrate to another sovereignty' (Bank of Augusta *vs.* Earl, 13 Pet., 588), though it may do business in all places where its charter allows and the local laws do not forbid (Railroad *vs.* Kootz, 104 U. S., 12). But wherever it goes for business it carries its charter, as that is the law of its existence (Relfe *vs.* Rundle, 103 U. S., 226), and the charter is the same abroad as it is at home. Whatever disabilities are placed on the corporation at home it retains abroad, and whatever legislative control it is subject to at home it must be recognized and submitted to by those who deal with it elsewhere. * * * He is conclusively presumed to have contracted with a view to such laws of that government, because the corporation must of necessity be controlled by them, and it has no power to contract with a

view to any other law with which they are not in entire harmony."

Canada S. R. R. *vs.* Gebhart, 109 U. S., 527, pp. 537–'8.

"It would seem, however, that the New York statute was intended to cut deeper, and as a matter of public policy to inhibit forfeitures by life insurance companies, except by the method therein provided.

"No life insurance company doing business in this State shall have power to declare forfeited or lapsed any policy * * * by reason of non-payment of premium, etc., except as therein provided.

"The statute is a limitation on the power of the company to do a specified thing, except under prescribed conditions. That which a corporation has not power to do, if attempted to be done by it, is *ultra vires*, and void.

"Admit that Griffith attempted to waive all notice of non-payment of premiums, if the power was lacking in the corporation to declare a forfeiture in consequence thereof, it is not perceived how it can be done. The very idea of a waiver involves the right of the contracting parties to make and accept such waiver. Consent never gives jurisdiction not otherwise possessed of the subject-matter to a court, for the reason that it lacks the power to adjudicate such subject-matter, except as conferred by law.

"A corporation being the creature of the law must confine its functions to the limits prescribed for its action, and if the law expressly inhibits it from doing a given thing it is powerless to do that thing, and, if it can do it only in a given manner, the prescribed method becomes the measure of its power.

"We are not met with any suggestion that the statute in question is violative of any chartered right of the defendant, and, in the absence of a showing to the contrary, must assume the New York statute to be in consonance with its constitutional and chartered rights.

"The statute in question is regarded as indicative of the legislative will that, as a matter of public policy, life insurance companies should be deprived of the power to declare policies forfeited for non-payment of premiums, except in the prescribed mode, and that being deprived of the power so to do, a waiver on the part of the insured cannot be con-

strued to confer such power in the face of the law which has taken it away.

"The reasons for such a policy are so numerous and obvious that it is not deemed necessary to occupy time and space in specifying them."

Griffith *vs.* New York Life Ins. Co., 101 Cal., 627, on pp. 641–'2.

"The laws of New York (the statute regulating forfeiture of life insurance) would apply to contracts made by insurance companies chartered under its laws, whether the contracts were made in New York or in any other State in the Union."

Gunn *vs.* Miller, 26 S. W. (Tex.), 280, on p. 282.

"Appellee owes its existence to the constitution and laws of the State of Missouri, under and by virtue of which it obtained its being and from which it derived all its powers. Natural persons may make any contract or perform any act not prohibited by law, while artificial persons—corporations—can do only those things which by express grant or necessary implications they are authorized or empowered to do by the State under which their charters were obtained. * * * Had the contract been entered into by the president and secretary of the company, after resolution adopted by the board of directors authorizing them to make it, and had it been executed with strict observance of all formalities, it would have been void, because it was prohibited by the laws of the State from which appellee derives its existence and powers."

Rue *vs.* Missouri Pac. R'y Co., 74 Tex., 479.

See also—

Story on Conf. Laws, 174, 175, note *a*.
Matthews *vs.* Skinner, 62 Mo., 331.
Black *vs.* Canal Co., 22 N. J. Eq., 422.

THE STATUTE CANNOT BE WAIVED IN WRITING OR OTHERWISE.

In each of the following cases the insurance company contended that this New York statute could be waived. In each case the companies insisted that the contracts were made (as in this case) outside of New York, and hence the parties free to waive the statute. The courts in deciding the cases use the following language:

"It would, seem, however, that the New York statute was intended to cut deeper, and as a matter of public policy to inhibit forfeitures by life insurance companies, except by the method therein provided.

"No life insurance company doing business in this State shall have power to declare forfeited or lapsed any policy * * * by reason of non-payment of premium, etc., except as therein provided.

"The statute is a limitation on the power of the company to do a specified thing, except under prescribed conditions. That which a corporation has not power to do, if attempted to be done by it, is *ultra vires* and void.

"The statute in question is regarded as indicative of the legislative will that, as a matter of public policy, life insurance companies should be deprived of the power to declare policies forfeited for non-payment of premiums, except in the prescribed mode, and that being deprived of the power so to do, a waiver on the part of the insured cannot be construed to confer such power in the face of the law which has taken it away."

Griffith *vs.* New York Life Ins. Co., 101 Cal., 627, on pp. 641–'2.

The supreme court of Michigan announced the same result in construing a policy of insurance made in New York and subject to a similar mode in reference to assessment societies passed in 1892. It uses the following language:

"The contract of insurance was made in the State of New York, and is governed by the laws of that State. * * * The notice sent to the insured, in the present case, did not

comply with this statutory provision. The design of the statute is apparent. A policy in regular life company fixes both the time of payment of premium and the amount thereof; yet that same statute provides that no life insurance company can declare forfeited or lapsed any policy by reason of the non-payment of any premium without notice, and prescribe what such notice must contain. It further provides that in case payment is made within the life of the notice, it shall be taken to be in full compliance with the requirements of the policy, anything therein contained to the contrary notwithstanding. Their statutory provisions form a part of the contract of insurance, and cannot be waived by the courts. Not having given such notice in the manner prescribed by the statute, it cannot be allowed to be declared a forfeiture of the policy by reason of its non-payment."

Warner *vs.* Life Association, 100 Michigan, 57.

"The statute of New York, (the one we are here considering) prescribes the conditions on which a policy may be forfeited for the non-payment of a premium. The statute is mandatory, and controls the contract. Its provisions are not subject to be set aside or waived by the company, or the assured, or by both together (Society *vs.* Clements, 140 U. S., 226, 233; Hicks *vs.* Insurance Co., 9th C. C. A., 215; Griffith *vs.* Insurance Co. (Cal.), 36 Pac., 117; Warner *vs.* Association, 100 Mich., 157)."

Nixon *vs.* Insurance Company, 81 Federal (C. C. A.), 796, 802.

"Though a policy of life insurance was issued by a New York company to a citizen of Texas, containing a provision to the effect that, if any of the premiums were not paid when due, the policy would become void, and that notice that each premium would be due at the date named in the policy was given by the policy, and that any other notice required by any statute was thereby expressly waived, the statute of New York enacted in 1876 (requiring notice to be mailed to the assured at least thirty days before the premium was due, in order to cause a forfeiture) applied, and a notice sent 15 days before the premium was due was insufficient" (syllabus).

Insurance Co. *vs.* Smith (Texas), 41 Southwestern, 680.

"The policies, being New York contracts, were, of course, dominated by the statute respecting forfeitures, as completely as though the statutory conditions had been explicitly incorporated in them. The adjudications of the highest court of the State treat it as one which must be strictly interpreted in favor of the assured, and hold that the defense of a forfeiture through non payment of premium is not availing to an insurance company, if there has been any departure on its part from the provisions of the statute in regard to notice (Carter *vs.* Insurance Co., 110 N. Y., 15, 17 N. E., 396; Phelan *vs.* Insurance Co., 113 N. Y., 147, 20 N. E., 827; Baxter *vs.* Insurance Co., 119 N. Y., 551, 23 N. E., 1048; McDougall *vs.* Assurance Soc., 135 N. Y., 551, 32 N. E., 251; De Frece *vs.* Insurance Co., 136 N. Y., 144, 32 N. E., 556)."

Hicks *vs.* Insurance Co., 60 Federal, 692.

The following are cases in point. In each case except the Clement the contract was made outside of the State where the insurance company was incorporated, the statute being enacted by the State in which the company was incorporated, the same contention being made as here:

"It (the statute) is therefore as much a part of every contract insurance of life governed by the laws of the State of Ohio and made after that statute was passed, as if incorporated in it; the general rule being that laws in existence are necessarily referred to in all contracts made under such laws, and no waiver of the parties nor stipulations in the contract can change the law (Hermany *vs.* Ins. Co., 151 Pa. State, 17; Ins. Co. *vs.* Ficklin, 74 Md., 172; Ins. Co. *vs.* Leslie, 47 Ohio State, 409; White *vs.* Society, 163 Mass., 108)."

Insurance Co. *vs.* Pollard, 26 Southeastern, 421, p. 422.

"In other words, the statute is to be entirely overthrown and set aside; and the insurance company under the guise of an agreement, is to acquire the power to accomplish the very result which the statute intended to prevent. Statutes would be very ineffective if they could be defeated in this way. If an untrue statement material to the risk is warranted, the policy is void; but the invalidity of the policy

depends upon the fact whether the statement is material to the risk. The materiality of the statement is the indispensable condition on which the invalidity of the policy depends, and it must be established by proof. It is not competent to substitute for this proof an agreement of the parties that it should be considered material. Neither can an agreement be valid which gives an effect to a warranty, which is in defiance of the statute. The legislature enacted a rule for the regulations of the contracts of insurance companies, which is a matter of public interest and concern. The operation of this rule does not depend on the agreement of these corporations to adopt it as a basis of their contracts; on the contrary, the rule prescribes the scope and effect of policies of insurance, and authoritatively determines the duties and obligations which arise from them."

Fidelity Ins. Co. *vs.* Ficklin, 74 Md., 172, on pp. 185–'6.

"It follows that the insertion in the policy of a provision for a different rule of computation from that prescribed by the statute in case of a default in the payment of a premium after three premiums have been paid, as well as the insertion, in the application, of a clause by which the beneficiary purports to 'waive and relinquish all right or claim to any other surrender value than that so provided, whether required by a statute of any State or not, is an ineffectual attempt to evade and nullify the clear words of the statute.'"

Insurance Co. *vs.* Clemens, 140 U. S., 226, on p. 234.

"The evident purpose of this legislation was to strike down, in this class of cases, literal warranties so far as they may be resorted to for the disreputable purpose of enforcing actually immaterial matters. This provides a rule of construction for the purpose of preventing injustice; and it is as much the duty of courts to enforce such rules as it is to administer the statutes of frauds and perjuries. It would be contrary to public policy to recognize the right of parties to circumvent the law by setting up a waiver such as was insisted on in this case. The court was therefore right in holding that the waiver was invalid."

Hermany *vs.* Life Association, 151 Penn., 17, on p. 24.

Judge Brewer, when sitting as circuit judge in the western district of Missouri, had occason to review this question, and in a very able opinion says:

"Such seems to have been the thought of the Missouri legislature, and it evidently intended by its legislation to provide a fixed and absolute rule applicable to all cases, absolute and universal, because if it applied only in cases in which the policies were silent, or if it could be waived or changed, a child can see that it would protect only so far as the insurance companies were willing. So, although no words of penalty are attached, no express denial of the right to waive, in fact no words of negation in any direction, yet it seems to me fair to say that the affirmative language of this statute discloses a public policy which no court ought to question or refuse to enforce (Railway Co. *vs.* Peavey, 29 Kan., 169). The legislature has by this language declared a rule in respect to forfeitures in life-insurance policies; it has thus established the policy which it believes should obtain in this State, and, though sitting on the Federal bench, it is my duty to administer the laws of this State in the spirit in which they were enacted, and to uphold both their letter and their spirit."

Wall *vs.* Equitable Assur. Soc., 32 Fed., 273, on p. 277.

"A contract which is illegal and void, either by the law of the place where it is made, or that of the place where it is performed, is illegal and void everywhere."

Hyde *vs.* Goodnow, 3 N. Y., 266–269.

This decision, having been announced prior to the execution of this contract, was as much a part of the contract as the statute. The company knew that such would be the construction of the contract by the courts of that State whenever it undertook to enforce the forfeiture provision of the policy in New York, where it alone could exact a forfeiture.

"A contract for a loan made payable in a foreign country may stipulate for interest higher than allowed at home, and if the contract is illegal there it will be illegal everywhere."

Bank of Louisville *vs.* Young, 37 Mo., 378.

In a case decided in the supreme court of Massachusetts, Justice Carey uses this language:

"The notes in suit having been made and payable in Louisiana, the question of the validity depends upon the law of that State. If they are void by that law, they are void everywhere."

Stevenson *vs.* Payne, 109 Mass., 378.

Such a construction of the contract can do no injustice to the insurance company. The insurance company, being a citizen of New York, is conclusively presumed to have known the statutes and public policy of that State. It drew the contract in such form, and in express words made it subject to the laws of New York. It knew that the courts of New York, as well as any other court, would not enforce a contract of forfeiture within New York except in compliance with its laws. It knew it was inserting in this contract an agreement in entire disregard of the public policy of the State in which it had caused the contract to be performed. This court must decide this case and enforce this contract just as the courts of New York would if the matter was before them. Would the appellate court of New York enforce a forfeiture of contract to be performed in New York contrary to and in entire disregard of the public policy and statutes of that State?

Similar quotations might be made from many other courts, some of which we will have occasion to cite subsequently in discussing other points.

We will at this point add the following references:

Reilly *vs.* Insurance Co., 43 Wisconsin, 449.
Chamberlain *vs.* Insurance Co., 55 N. H., 249.
Emery *vs.* Insurance Co., 52 Me., 322.
White *vs.* Insurance Co., 4 Dil., 177.
Ins. Co. *vs.* Leslie, 47 Ohio St., 409.
White *vs.* Society, 163 Mass., 108.
Ins. Co. *vs.* Rudwig, 80 Ky., 223, 233–'5.
Ins. Co. *vs.* Smith, 41 S. W., 680.

THE ALLEGED DEFENSE OF ESTOPPEL CANNOT PREVAIL AGAINST BENEFICIARIES, DEFENDANTS IN ERROR; CONDUCT OF MR. HILL WOULD NOT ESTOP THEM.

The company insists that by the alleged conduct of Mr. Hill subsequent to the issuance of the policy Mr. Hill waived the service of the statutory notice and the beneficiaries are estopped from enforcing the contract.

We have shown that the contract cannot thus be waived. If the contract cannot be waived in writing, it cannot, for obvious reasons, be waived in any other manner. But there is another and complete answer.

The moment the policy was issued and delivered it belonged to the beneficiaries. They had a right to pay the premiums and keep it alive. Any declaration or statement he might make would not bind or estop them. This court has well stated the rule as follows:

"And it is a general rule that a policy and the money that may become due under it belong the moment it is issued to the beneficiary named in it, and the person procuring the insurance has no power by deed, assignment, or will, to surrender the policy and issue a new one, or by other act, to transfer to any other person the interest of the person named."

Wash. Bank *vs.* Hume, 128 U. S., 195, on p. 207.

Mr. Bacon, in his admirable work on Insurance, says:

"When a policy of insurance is taken out payable to some other person than the assured, the beneficiary ordinarily has a vested right in the policy and its proceeds, consequently the assured cannot in any way control or dispose of the policy. A leading writer on the subject says (Bliss on Life Ins., 318): 'We apprehend the general rule to be that a policy, and the money to become due under it, belong the moment it is issued to the person or persons named in it as the beneficiaries, and that there is no power in the person

procuring the insurance, by any act of his, by deed or by will, to transfer to any other person the interest of the person named. An irrevocable trust is created. The legal representatives of the insured have no claim upon the money, and cannot maintain an action therefor, if it is expressed to be for the benefit of some one else.' And this statement is cited and approved by the supreme court of Indiana (Hanley *vs.* Heist, 86 Ind., 196; Am. Rep., 286; Holland *vs.* Taylor, 111 Ind., 121). In a case arising in Massachusetts, where, in pursuance of an understanding with the mother of the insured, he took out a policy payable to her, but, upon his subsequent marriage, surrendered it and received a new one payable to the wife, it was held that the mother's rights were not affected. In this case (Pingrey *vs.* National Life Ins. Co., 144 Mass., 381; 11 N. East. Rep., 111 Ind. 121), the court said: 'There appears to have been a full understanding between him (the assured) and his mother that the policy was to be taken out for her benefit, and afterwards that it had been so done. In point of fact it was made payable to her, and this was done with the intention of giving her the benefit of it. This constituted a valid settlement in her favor. Nothing remained to be done by him to complete it. He might, indeed, afterwards fail to pay the annual premiums. This, however, does not prevent it from being a good trust. An unrevoked trust is valid, even though there is an express power of revocation' (Stone *vs.* Hachett, 12 Gray, 227). In this case the assured reserved to himself no power of revocation or of changing the beneficiary. It is true that he entered into no obligation to continue to pay the premiums; but the omission to do this did not have the effect to give him an implied power of revocation. His mother herself might continue the payment of the premium. Moreover, by the terms of the policy, after payment of two full annual premiums, it would not lapse, and certain valuable rights would still exist under it. Under the circumstances the assured could not legally surrender the policy without his mother's consent, and her rights are not affected by such surrender. This seems to us to be the true rule, and it is supported by the weight of authority," citing numerous authorities.

Bacon on Ins., vol. 1, sec. 292.

To the same effect is:

May on Ins., vol. II, sec. 399 L; also sec. 399 P.
Wash. Bank *vs.* Hume, 128 U. S., 195.
Glanz *vs.* Gloeckler, 104 Ill., 573.
Gould *vs.* Emerson, 99 Mass., 155.
Wilburn *vs.* Wilburn, 83 Ind., 55.
Ricker *vs.* Ins. Co., 27 Minn., 193.
Whitehead *vs.* Ins. Co., 123 N. Y., 156.
Ins. Co. *vs.* Smith, 44 Ohio St., 146.
Garner *vs.* Ins. Co., 110 N. Y., 266.
Pilcher *vs.* Ins. Co., 33 La., 322.

THE DEFENSE DOES NOT SHOW FACTS SUFFICIENT TO SHOW AN ESTOPPEL OR WAIVER.

All the text-writers agree that to establish the estoppel suggested by this defense all the following elements must appear:

"1. There must have been false representation or a concealment of material facts.

"2. The representation must have been made with knowledge, actual or virtual, of the facts.

"3. The party to whom it was made must have been ignorant, actually and permissibly, of the truth of the matter.

"4. It must have been made with the intention, actual or virtual, that the other party should act upon it.

"5. The other party must have been induced to act upon it" (Bigelow on Estoppel, p. 570; Pomeroy, Eq. of Jur., 1st ed., sec. 805; Bacon on Ins., 2nd ed., sec. 420; May on Ins., 3rd ed., sec. 507, and cases cited by the above authorities.)

(1.) It is useless to point out wherein the alleged defense fails under the above rules, for it fails in them all. If any one was guilty of false representations, it was the company. (2.) The insured could not have been aware of the facts; if ever admitted, the policy was forfeited; the company was if

any such admission was made by the insured. (3.) It could not have been done with the intent that the company would act upon it. It had already declared the policy forfeited. (4.) The insurance company was not ignorant of the fact of non-forfeiture. (5.) It does not claim to have acted or refrained from sending the notice on that account.

THE STATUTE IN QUESTION DOES NOT COVER THE STATUTE RELATIVE TO RESERVE, BUT BOTH WORK IN ENTIRE HARMONY.

The company urges with considerable zeal that it was the purpose of the legislature, in enacting the law, to protect from forfeiture such portion of the policy as the premiums had already purchased. If such was the intention of the legislature, it knew but little about the English language when it enacted the law.

1. If that had been the intention of the legislature, it would have used language appropriate to express such an intent.

2. The language of the act is susceptible of no such construction.

3. No assignment of error was made touching this point, and nothing is in the record upon which such a claim can be based.

4. The legislature did pass a law on the 21st day of May, 1879 (chapter 347, Laws of the State of New York), which explicitly covers and protects the policy-holder as to the reserve on his policy. The two statutes work together in entire harmony, and the one does not cover the evil protected by the other. The Sears and Cohen cases well illustrate this and at the same time show the wisdom of the legislature in enacting each statute.

Mr. Cohen took out his policy on the 10th day of June, 1885, and paid seven and one-half years' premiums, but failed to pay the semi-annual premium on December 10, 1892. It will be noticed the policy is a semi-endowment twenty-year policy. The premiums are very heavy and the reserve is correspondingly large. This reserve, if used to purchase extended insurance, under the New York statute, would carry the policy for its full face for at least thirteen years and 130 days, the company still retaining as forfeited all dividends and one-third of the reserve. Flitcraft's Manual of Life Insurance, page —, 1895 edition (Missouri statutes and New York being practically the same). This would have continued Mr. Cohen's policy of $3,000 in full force and effect until about May, 1906, or nine years beyond his death, although having paid his full share of expenses of the company and the company still forfeiting, as it legally may do under the statutes, one-third of the reserve and all the dividends and accumulations on the policy, or Mr. Cohen could have surrendered his policy, under the New York statute, six months after he had been put in default by service of the statutory notice, and received a paid-up policy for over one thousand dollars, payable at his death.

But if the defense of a forfeiture prevails, all this is lost to the insured, because if the policy was forfeited during the lifetime of Mr. Cohen it was forfeited on the 10th day of December, 1892, and more than six months had elapsed before his death. So it would be useless for plaintiff to allege or prove the time which the reserve would purchase extended insurance or the amount of paid-up insurance.

But the company did not serve the notice and the policy was not forfeited; so it was never necessary for Mr. Cohen to surrender the policy and obtain a new one, either for paid-up or extended insurance. He could delay surrendering the policy until fully six months after the service of the statu-

tory notice. He had the thirty days after the service of the notice to elect to make further payments and six months after the termination of the thirty days to elect whether he would take paid-up or extended insurance. Mr. Sears had paid two and a half annual premiums on a ten-payment life policy, the premiums being $491 per annum. The payment of the half a year's premium more under the New York law would have entitled him to surrender it and take a paid-up policy for $3,000 or extended insurance for nearly nine years.

See Flitcraft, 1885 ed., p. 526.

This money could have been borrowed from any reputable company or from almost any bank with the policy as security.

But the fact remains that reserve on the premiums actually paid for two years (omitting all consideration of the first half of the third year's premium, as parts of years are not considered in fixing the amount of either paid-up or extended insurance), which was unused, was sufficient to have carried the policy beyond his death.

Under the non-forfeiting law of Missouri, the first two premiums would have carried the full policy for five years, 118 days beyond the 18th day of May, 1893, or six months beyond his death.

Flitcraft Life Insurance Manual, 1895 ed., 526.

Under any ten-pay life policy issued by the Mutual Benefit Life Insurance Company of Newark, New Jersey, after the payment of two years' premiums (the premiums being a few dollars less), the policy would have been extended by its own terms automatically, without any surrender of the policy or other act on the part of the insured, seven years and twenty-six days, or until the month of June, 1900, over two years beyond his death; the difference in the length of time being due to the fact, as stated, that the statute gives the company

the benefit of a forfeiture of two-thirds the reserve, while this company gives the full value of the reserve.

The same is practically true of policies of the New York Life, Penn Mutual, and other companies.

While the plaintiff cannot claim the benefit of the statute of Missouri or the contract issued by the Mutual Benefit Company or the New York Life, it shows conclusively that the company was fully paid for the ten thousand dollars' insurance during his life. Besides, the company has been allowed all deferred premiums, amounting to over twenty-five hundred dollars, which is that much more than it cost them to carry all its policy-holders at the same age for the same length of time on similar policies.

But the defendant in error can claim the benefit of the laws of New York, while the non-forfeiture law of New York does not give the insured the benefit of the reserve unless he surrender the policy and take out a new one (in this it is more favorable to the insurance company than like statutes of other States, in fact it requires an utterly useless act), but its other law relative to notice does leave the policy in force. While the insured is held to a strict compliance of the law as to surrender of policy for new one in case of lapse, the company, on the other hand, is held to a strict compliance with reference to notice before it may declare a policy lapsed or forfeited. We think we have clearly shown that the defense pleaded is not open to the company. Mr. Sears, Mr. Cohen, Mr. Hill are all dead. If any agent should testify to the facts alleged in the answer how are we to meet it? We cannot get their version of what happened nor can such evidence be met in any case arising under the statute. Other cases might better illustrate the wisdom of taking from the insurance company the power to terminate or forfeit a contract in this manner. But we think these are sufficient to show the statute ought not to be lightly set aside. If the company had followed the method provided in the statute and the insured had

failed to protect himself, whether from ignorance or otherwise, our contracts would have ended, though a hardship would have resulted in each case. But it did not. It claims to have acted in entire disregard of the statute. It offers a defense that is prohibited by the statute. The statute saves to the insured the full benefit of a contract for which he has paid. We cannot close this point better than to quote the words of this court:

"The statute of New York prescribes the condition upon which a policy may be forfeited for the non-payment of a premium. The statute is mandatory, and controls the contract. Its provisions are not subject to be set aside or waived either by the company, or the assured, or by both together."
Equitable Life *vs.* Nixon, 81 Fed., 802.

To read the brief of the petitioner one might be persuaded that it meant what it said about "exact justice," and that it would always pay a policy, no matter whether there had been a technical surrender of the old for a new, so long as the insured had paid an amount sufficient to carry his risk beyond his death. Not so. They have fought these two cases through two courts, and are asking leave to litigate them still further in this court. This company never does give a policy-holder the benefit of paid-up or extended insurance, though the policy may have carried for many years and the reserve amounts to a large percentage of the face of the policy, unless the insured strictly and technically complies with the requirements of the statute.

IT WAS NOT NECESSARY FOR PLAINTIFF TO ALLEGE OR PROVE THE PAYMENT OF PREMIUMS SUBSEQUENT TO THE FIRST.

Under the New York statute no premium was due and payable on the contract until the service of the statutory notice by plaintiff in error. The receipt of the payment of the first premium is acknowledged in the policy; the con-

tract continued in force and could not be forfeited except in the manner provided by the statute. That is the service of the statutory notice by plaintiff in error and the non-payment of the premium in pursuance to such notice.

The service of this notice was a condition precedent to the right of the insurance company to declare a forfeiture. Hence before the company could defend on the ground of forfeiture it was incumbent on it to allege and prove that it performed the necessary acts to entitle it to declare a forfeiture of the contract. Whether it did send the notice was a fact peculiarly within its own knowledge. The burden of sending the notice was upon it, and if it would claim the benefit of such an act it must allege and prove it performed it. This question was before the court of appeals of New York in the case of Baxter *vs.* Ins. Co. The pleadings were practically identical with the pleadings in this case. In fact we followed that decision, believing that any court that would be called upon to construe the statute of New York would follow the decision of the highest court of that State, and, more than that, we believe it to be a good law. In this case as that the unpaid premiums, with interest, were deducted from the amount that otherwise would have obtained. We file with this brief certified copies of the pleadings and record. We will quote very fully from that case.

"The complaint alleged the delivery of this contract to the insured, his death on the 7th day of September, 1884, the presentation to the defendant of satisfactory proofs of death, according to the terms of the policy, the refusal of the defendant to pay, and that the insured had made payments of premium according to his agreement with the defendant. No issue was made by the defendant upon any of the allegations of the complaint except the averment that the insured had paid the premiums according to the terms of the policy, which it denied, and specially alleged that the premiums which became due on the 24th day of August, 1884, had not been paid (almost the identical language of the pleadings in this case). * * *

"There was no proof given at the trial by either party to show whether this notice was served or not. It is obvious that this statute when imported into the contract modified its conditions in very material respects. The duration and validity of the policy is not then dependent upon payment of the premium on the day named therein, but upon payment thirty days after the notice had been given. The condition upon which the policy can be forfeited, or in any way impaired as a subsisting contract of insurance, is a failure on the part of the insured to pay the premium within thirty days after notice. The statute prescribes this notice as a necessary condition of forfeiture, and unless it was served the insured was not in default, because payment within thirty days after notice is to be taken as a full compliance with the conditions as to payment of premium. *In the absence of proof, on the part of the defendant, as to the service of the notice, this allegation of the complaint was sufficiently established within the meaning of the contract, as evidenced by the policy and the statute when read together.* Before the defendant could raise any question in regard to the non-payment of the August premium, it was necessary for it to show that it had complied with the statute by serving the notice, as this step was essential to put the insured in default, or raise any point based on his omission to pay the last quarterly premium.

"*It must, therefore, be assumed, in the absence of such notice, that the policy in question was in full force at the death of the insured*, and even if the payment of the last premium was omitted the obligation and promise of the defendant to pay upon death, during the life of the policy, was unimpaired. The purpose of the statute referred to was to establish a rule which would preserve to the assured the benefits of premiums paid, and to prevent the lapse of policies of life insurance without ample notice, and an opportunity to save them from forfeiture by payment of premiums due within the specified time, and at the same time secure the company, in case it is obliged to pay, the full amount of the premium which the policy calls for. When the provisions of this statute are adopted in a contract of insurance, for the purpose of modifying the forfeiture clause and the other strict conditions contained therein, then the clause and these conditions should be so construed

as to give to the assured the full benefit contemplated without altering any other provision of the policy, if this can be done without violating any rules of law. When the scope and purpose of the law as deducted from the decision of the court and the courts of other States involving a construction of the same or similar statutes is considered, no good reason is perceived for interfering with the result in this case in the court below (Phelan *vs.* N. M. L. Ins. Co., 113 N. Y., 147; Carter *vs.* Brooklyn Life Ins. Co., 110 *id.*, 15; Carter *vs.* John Hancock Mutual Life Ins. Co., 127 Mass., 153; Boyd *vs.* Cedar Rapids Ins. Co., 70 Ia., 325).

"*It was not necessary, in order to enable the plaintiff to recover the sum insured, to pay or tender before action brought the premium that was payable on the 24th day of August prior to the death of the insured.* If the policy was in full force when the assured died, as we think it was, that event fixed the liability and obligation of the defendant, notwithstanding the omission to make that payment. Nothing remained to be done by the widow of the insured or her assignee, except to present to the defendant the proofs of death required by the policy. The contract was kept in life by force of the statute, until the contingency upon which the payment depended occurred. The death of the assured created the relation of debtor and creditor between the defendant and his widow, and the unpaid premium, with interest from the date when payable, was a claim to be deducted by the defendant from the sum due upon the policy. This put the defendant in precisely the same position in which it would have been if the premium had been duly paid (Carter *vs.* John Hancock M. Life Ins. Co., *supra*).

"It was conceded upon the argument in this case that the unpaid premium (which is true in this case), and interest thereon, was deducted from the verdict, and thus no injustice has been done.

"The judgment should be affirmed."

Baxter *vs.* Insurance Co., 119 N. Y., 450, on pp. 453–7.

In a still later case this decision was upheld by the same court, in which all the justices concurred. The following quotation states the necessary facts:

"There is no question of pleading involved. The plaintiff was not bound to allege or prove the payment of the

annual premiums when due. The contract is to be read as if the act of 1876 had been literally incorporated into it. There could be no forfeiture for this cause unless the defendant alleged and proved non-payment after the due service of the notice required by law. As the defendant was never in a position where it could insist upon a forfeiture, it becomes unnecessary to consider the question of the sufficiency of the notice served."

De Frece *vs.* Insurance Co., 136 N. Y., 144, on page 151.

The Supreme Court of the United States has held, in a long line of cases, that where the highest court of a State has construed a statute of that State, such construction is binding on all other courts, and becomes as much a part of the statute as though actually incorporated into it.

The supreme court of Washington has sustained the above proposition.

Greismer *vs.* Mutual Life Insurance Co., 10 Wash., 202, on page 210.

It will be thus seen that the highest court, both of Washington and New York, has held our form of pleading is correct. Defendant in error, living in the State of Washington, had a right to rely on these authorities as establishing the law of the case and upon which she could rest with absolute confidence, one being the law of the place of the contract, the other the law of the forum. This plaintiff was familiar with these decisions when she commenced this action. No court will tell her she is in error in relying upon them confidently as settling the questions. Would it not be doing her a great wrong and injustice to dismiss her action and compel her to tender a premium on a contract that the company has repudiated, and that, too, contrary to the laws of the place of contract and the forum as well. Further than this the decisions of both States are in entire harmony with numerous other courts.

Each of the following cases supports our contention:

Osborne *vs.* Ins. Co., 67 Pac. (Cal.), 616.
Ins. Co. *vs.* Mullen, 34 S. W., 605.
Griffith *vs.* Insurance Co., 101 Cal., 621.
Nixon *vs.* Insurance Co. (C. C. A.), 81 Fed., 796, 802.
Griesmer *vs.* Insurance Co., 10 Wash., 202.
Warner *vs.* Insurance Co., 100 Mich., 167, 159, 160.

NO TENDER OF THE PREMIUM WAS NECESSARY BEFORE BRINGING SUIT.

The above authorities hold that it was unnecessary to tender unpaid premiums before commencing action. There is another good and sufficient reason. When the company was notified of the death of the insured it denied all liability on the contract, and elected to stand on the ground that the policy was forfeited. Having assumed this attitude, a tender was unnecessary. The United States Supreme Court states the rules as follows:

"The proposition is thus expressed by this court at its last term, in Hill *vs.* Exchange Bank, 105 U. S., 319, as a result of the cases above cited. 'It is a general rule that when the tender of the performance of an act is necessary to the establishment of any right against another party, this tender or offer to perform is waived or becomes unnecessary when it is reasonably certain that the offer will be refused.'"

Kauffman *vs.* Lee, 106 U. S., 196, on page 202.

The above is fully supported by the cases of:

United States *vs.* Peck, 102 U. S., 64.
Poindexter *vs.* Greenhow, 114 U. S., 270–282.
Lawrence *vs.* Miller, 86 New York, 136.
Insurance Co. *vs.* Vining, 7 C. C. A., 359.
Insurance Co. *vs.* Smith (Ohio), 5 Northwestern, 417.

IT WAS NOT NECESSARY TO PLEAD OR PROVE THE STATUTE OF NEW YORK. THERE WAS NO DEPARTURE FROM LAW TO LAW OR FACT TO FACT.

It is a rule of law as old as the courts of the United States that it is unnecessary to aver or prove the laws of any State of the Union. It is only necessary to show that a contract is governed by the laws of a particular State, and then plead the facts that would entitle the pleader to recover if the action was brought in the courts of such State.

In this case plaintiff pleads (paragraph IV, p. 4) that the plaintiff in error is incorporated under the laws of New York. It further alleges in paragraph V that the defendant made, executed, and delivered in the city of New York and State of New York a certain contract or policy of insurance. It then sets forth the policy *hæc verba*, which provides the company shall pay its contract of $20,000 in the city of New York. The insured is to pay all the future premiums in the city of New York. The policy recites that it is executed in New York; that proofs of death are to be submitted to it at its home office in New York. The policy also provides that after the payment of certain premiums it will issue a paid-up policy for the amount required by the provisions of the act of May 21, 1879, chap. 347, Laws of the State of New York.

In paragraph VI of the complaint plaintiff alleges as follows:

"That the application referred to is not in the hands of plaintiffs, but is in the hands and possession of defendant and plaintiffs cannot set forth a copy thereof, but plaintiffs allege that the said application contained the following agreement and words: *That the contract of insurance when made shall be held and construed at all times and places to have been made in the city of New York.*"

These facts were pleaded in the original complaint and placed the contract directly under the laws of New York. It shows the plaintiff was relying on the contract and all the laws of New York that were operative on a contract of such nature. We have shown under point two of this brief that we followed, in pleading our case under this law, the rule as settled by the highest court of the State of New York and the State of Washington on similar contracts. It is very evident that the plaintiff in error so understood the pleading, because in its answer it avers as follows, page 21 :

"This defendant alleges that the said plaintiffs, and each of them, should be and are estopped from and should not be permitted to allege or prove that defendant did not mail, or cause to be mailed, or otherwise given to said George Dana Hill a notice stating the amount of premium due on said policy on April 29, 1887, or at any other time, with the place where the same should be paid, the person to whom the same is payable, and stating that unless the premium then due should be paid to the company, or its agents, within thirty days after the mailing of such notice, the policy, and all payments made thereon, should become forfeited, or any other notice prescribed by any statute or statutes of the State of New York.

"It would be hard to conceive of a pleading in which more facts are plead showing that a certain contract was wholly governed by the laws of a particular State. We have shown in the first point in this brief that these facts, being admitted as they are, this court is bound as a matter of law to pronounce it a New York contract. Having plead the facts we can claim the benefit of any New York law which is to our advantage."

The opinion of Judge Hawley, in the court below, is a complete answer to petitioner's argument, a part of which is as follows:

"In the first place, the cases cited and relied upon by the plaintiff in error are clearly distinguishable in their facts from the case at bar, in this: that the plaintiff's right of

recovery therein rested solely upon another separate and distinct cause of action from the one stated in their complaint. In the present case the right of the defendants in error to recover is based exclusively upon the contract set out in their complaint, to wit, the policy of insurance. The cause of action as set out in the complaint was based upon the identical facts upon which the court gave judgment. There was, therefore, no departure in this case, either from fact to fact, or from law to law, and hence, the principle contended for has no application to this case. There was no necessity for the defendants in error to plead the statute of New York. The United States courts take judicial notice of all the public statutes of the several States. Moreover, the question of forfeiture was solely a matter of defense. It is not considered good pleading to anticipate matters of defense."

Record, p. 63.

Our cause of action was based on the policy of insurance as construed and controlled by the laws of the place of contract, which by our pleadings we showed to be in the State of New York, the laws of which State we clearly alleged we were relying upon. We plead all the facts necessary to be plead if we were suing in the courts of that State. This brings us clearly within the decisions of this court.

"And in further affirmation of the doctrine here laid down, we hold that the courts of the United States can and should take notice of the laws and judicial decisions of the several States of this Union, and that with respect to these, *nothing is required to be specially averred in pleading which would not be so required by the tribunals of those States respectively.*"

Pennington *vs.* Gibson, 16 Howard, 65.

"The Federal courts take judicial notice of the laws of all States, and it is only necessary that the pleadings show a state of facts to which any statute of the Union applies, *because those laws are known to the court below as laws alone, needing no averment proof.*"

Course *vs.* Stead, 4 Dall., 22, 27 (4 U. S. Bk. 1, L. ed., 724, 726).

Hanley *vs.* Donohue, 116 U. S., 1–6.

"*The law of any State of the Union, whether depending upon statutes or upon judicial opinion, is a matter of which the courts of the United States are bound to take judicial notice, without plea or proof.*"

Owings *vs.* Hull, 9 Pet., 607.
Pennington *vs.* Gibson, 16 How., 65.
Draw Bridge Co. *vs.* Sheperd, 20 How., 227 (61 U. S. Bk. 15, L. ed., 396).
Lamar *vs.* Micou, 114 U. S., 218.

"With respect to the refusal of the court to allow certain other public statutes to be introduced in evidence, it need only to be said that the courts of the United States take judicial notice of all the public statutes of the several States."

Gormuly *vs.* Bunyan, 138 U. S., 623.

In an earlier case the court uses this language:

"In the court below statutes and decisions of Rhode Island were agreed or proved and found as facts in seeming forgetfulness of the settled rule that the circuit court of the United States, as well as this on appeal or error from that court, takes judicial notice of the laws of every State of the Union. Hanley *vs.* Donoghue, 116 U. S., 1, 6 (29 : 535, 537), and cases there collected. No reference was made to the statute of 187–, chap. 600, to which the plaintiff has now referred and which repeals and modifies in some respects the statutes agreed and found in the record to be still in force; and it is contended for the defendant that this court should not review a judgment on a ground which was not presented to the court below. That is doubtless the general rule. Klein *vs.* Russell, 86 U. S., 19 Wall., 433 (22 : 116); Badger *vs.* Ranlett, 196 U. S., 255 (27 : 191). But it would be unreasonable to apply it when then the effect would be to make the rights of the parties depend upon the statute which, as we know, and are judicially bound to know, is not the statute that governs the case."

Bank *vs.* Franklyn, 120 U. S., 747.

"We are of the opinion that the circuit court was bound to take judicial notice of the laws of Louisiana. The circuit courts of the United States are created by Congress, not

for the purpose of administering the local law of a single State alone, but to administer the laws of all the States in the Union, in cases to which they respectively apply. The judicial power conferred on the General Government by the Constitution, extends to many cases arising under the laws of the different States. And this court is called upon, in the exercise of its appellate jurisdiction, constantly to take notice of and administer the jurisprudence of all the States. This jurisprudence is, then, in no just sense, a foreign jurisprudence to be proved in the courts of the United States, by the ordinary modes of proof by which the laws of a foreign country are to be established; *but it is judicially taken notice of in the same manner as the laws of the United States are taken notice of by these courts.*"

Owings *vs.* Hull, 9 Pet., 607, on p. 625.

To the same effect are the following:

Gordon *vs.* Hobart, 2 Sumn., 401.
Woodworth *v.* Spaffords, 2 McLean, 168.
Jasper *v.* Porter, 2 McLean, 579.
Jones *v.* Hays, 4 McLean, 521.
Mewster *v.* Spalding, 6 McLean, 24.
Merrill *v.* Dawson, Hempst., 563.
Harpending *v.* Reformed Dutch Church, 16 Pet., 455.
Covington Draw Bridge Co. *v.* Sheperd, 20 How., 227.
Beatty *vs.* Knowler, 4 Pet., 152.
United States *vs.* Perot, 8 Otto, 428.
U. S. *vs.* Turner, 11 How., 663–668, 13, 856–'9.
Chever *vs.* Wilson, 9 Wall., 108–19–604.
McNeil *vs.* Hollbrook, 12 Pet., 84.
Christmas *vs.* Russel, 5 Wall., 302.
Ellwood *vs.* Flanigan, 104 U. S., 562.

The Weyler case does not pretend to change the above rule, nor is there the slightest conflict between it and the decision of the lower courts.

Our cause of action arises on the contract set out in the complaint as a New York contract; plead all the facts

showing that was a New York contract; plead specially the stipulation in the application by which it was agreed that it was subject to all the laws of New York applicable to it. It was not necessary to prove the statute; then why plead it, as the court says such general statutes need neither averment nor proof.

As we have shown, we followed the form of pleading to bring us within the statute as adopted by the highest court of New York and Washington.

Baxter *vs.* Ins. Co (*supra*), 119 N. Y., 450.
De Frece *vs.* Ins. Co. (*supra*), 136 N. Y., 144.
Phelan *vs.* Ins. Co. (*supra*), 112 N. Y., 147.
Griesmer *vs.* Ins. Co. (*supra*), 10 Wash., 202.

In conclusion, we again urge upon this court that this case does not raise any question of sufficient importance to call for a decision. It clearly belongs to that class of cases where this court has repeatedly said the judgments of the circuit courts of appeals should be final; more than this, the judgment of the circuit court of appeals was right and in conformity to the settled law. Nor should the petitioners be put to an additional expense trying this case here, contrary, as we believe, to the intent and purpose of the act of 1891.

Respectfully submitted.

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